Supreme Court, U.S.
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No. 91-1894

In The

Supreme Court of the United States

October Term, 1992

TRUITT V. LIVELY,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR UNITEDBANK-HOUSTON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

I.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE JUDGMENT BELOW, RELYING ON U.S.C. 12 § 1821(d)(2)(A) and (B), INCORRECTLY HELD THAT THE GUARANTY AGREEMENT EXTENDED TO THE FDIC AS RECEIVER FOR UNITEDBANK-HOUSTON. THE QUESTION PRESENTED IS WHETHER THIS HOLDING CONTRAVENES THE WELL-SETTLED LAW OF THE SUPREME COURT OF THE STATE OF TEXAS WHICH HOLDS THAT A GUARANTY MUST BE STRICTLY CONSTRUED AND MAY NOT BE EXTENDED BEYOND ITS PRECISE TERMS BY CONSTRUCTION OR IMPLICATION.

II.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE JUDGMENT BELOW HELD THAT THE FORECLOSURE SALE WAS PROPER AND COMPLIED WITH THE REQUIREMENTS OF THE TEXAS PROPERTY CODE, EVEN THOUGH THE PROPERTY DESCRIPTION IN THE NOTICE OF TRUSTEE'S SALE WAS INACCURATE. THE QUESTION PRESENTED IS WHETHER THE FIFTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH LAW OF THE NINTH CIRCUIT IN *IN RE NORMA C. WORCESTER, DEBTOR*, 811 F2d 1224 (9th Cir. 1987), WHICH HOLDS THAT AN INACCURATE DESCRIPTION OF PROPERTY IN NOTICE OF TRUSTEE'S SALE IS A MATERIAL IRREGULARITY RESULTING IN A GROSSLY INADEQUATE CONSIDERATION AND A VOID SALE.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Argument 2

Conclusion 8

TABLE OF AUTHORITIES

Page

CASES:

American Sav. & Loan Ass'n v. Musick, 531 S.W.2d 581 (Tex. 1975) 7

Diversified Developers, Inc. v. Texas First Mortgage REIT, 592 S.W.2d 43 (Tex. Civ. App. 1979) 8

Vastine v. Bank of Dallas, 808 S.W.2d 463 (Tex. 1991) 6

Worcester, In re, 811 F.2d 1224 (9th Cir. 1987) 6

STATUTE AND REGULATIONS:

Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L.No. 101-73, § 109(b), 103 Stat. 216 ..... 2, 3, 4

12 U.S.C. 1821(c) (Supp. 11 1990) 2, 3

12 U.S.C. 1821(d) (Supp. 11 1990) 2, 3, 4, 5

12 U.S.C. 1821(e) prior to the FIRRE Act of 1989 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is unreported, but the judgment is noted at 952 F.2d 400 (Table). The opinion of the district court (Pet. App. 13-18) is reported at 760 F.Supp. 115.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1992. A petition for rehearing was denied on February 27, 1992. Pet. App. 9-10. The petition for a writ

of certiorari was filed on May 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

ARGUMENT

1. Respondent stated in its Brief (Resp. 3) that the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals and, therefore, no further review by this Court is warranted.

Respondent fails to acknowledge that under Rule 10.1(a) of the Rules of Supreme Court of the United States that this Court may review a federal question decided by a United States Court of Appeals in a way in conflict with a state court of last resort.

The very essence of Petitioner's claim is that the judgment of the Fifth Circuit, relying on 12 U.S.C. § 1821(d) (A) and (B), incorrectly held that the guaranty agreement extended to the Respondent. This holding clearly contravenes the well-settled law of the Texas Supreme Court which holds that a guaranty must be construed strictly and may not be extended beyond its precise term by construction or implication.

Under 12 U.S.C. 1821(c) after the enactment of FIRRE of 1989 the federal law now states:

> "(3) Insured State depository institutions. (A) Appointment by appropriate State supervisor. Whenever the authority having supervision of any insured State depository institution (other than a District depository institution) *appoints a conservator or receiver* for such institution *and*

> *tenders appointment* to the Corporation, the Corporation *may accept* such appointment. (B) Additional powers. In addition to the powers conferred and the duties related to the exercise of such powers imposed by State law on any conservator or receiver appointed under the law of such State for an insured State depository institution, the Corporation, as conservator or receiver pursuant to an appointment described in subparagraph (A), shall have the powers conferred and the duties imposed by this section on the corporation as conservator or receiver".

12 U.S.C. § 1821(c) (3) references that the Corporation as receiver *shall* have the powers conferred and the duties imposed by this section on the Corporation as Receiver under 12 U.S.C. § 1821(d) (2) (A) and (B), which section is the subject of this review.

It is the contention of the Petitioner that the FIRRE Act of 1989 is not retroactive and the language used in 12 U.S.C. § 1821(c) (3) limits the authority conferred therein to only those appointments made subsequent to the enactment of the FIRRE Act of 1989. The specific terms – "Whenever the authority having supervision of any insured State depository institution, . . . , *appoints* a conservator or receiver for such institution and *tenders appointment* to the Corporation the Corporation *may accept* . . . " – dictate an action to take place in the future and would not be retroactive to appointments of receivers made prior to the FIRRE Act of 1989. Respondent was appointed receiver of UnitedBank-Houston on April 30, 1987, prior to the FIRRE Act of 1989.

Therefore, Petitioner contends that the Respondent has only those powers, if any, provided under 12 U.S.C.

1821(e) as it existed prior to the enactment of the FIRRE Act of 1989 stated as follows:

> "(e) Whenever any insured State bank (except a District bank) or any insured branch (other than a Federal branch) of a foreign bank shall have been closed by action of its board of directors or by the authority having supervision of such bank, as the case may be, on account of inability to meet the demands of its depositors, the Corporation shall accept appointment as receiver thereof, if such appointment is tendered by the authority having supervision of such bank and is authorized or permitted by State law. With respect to any such insured State bank or insured branch of a foreign bank, the *Corporation as such receiver shall possess all the rights, powers and privileges granted by State law to a receiver of a State bank.*"

Respondent (Resp. 4) states that contrary to Petitioner's contention, the court of appeals did not create a "new" category of successors who may enforce a guaranty. This contention by Respondent is contrary to the very obvious effect of the court of appeals decision which had to create a new category of "statutory successor" in order to circumvent the very clear wording of the guaranty. This new category of "statutory successor" can not be used to override the limitation of liability specifically provided in the guaranty under the laws of the Supreme Court of Texas.

Further, there is a defined question as to whether 12 U.S.C. § 1821(d) (A) and (B) specifically applies to the circumstances which arise under 12 U.S.C. § 1821(d) (E) where the corporation as receiver may place a failed bank

in liquidation and proceed to realize upon the assets of the institution, having the regard to the conditions of credit in the locality.

The Respondent did place UnitedBank-Houston in liquidation. Respondent would not be able to operate United Bank-Houston under the provisions of 12 U.S.C. § 1821(d) (A) and (B) because this section relates to a failed bank which continues to be operated under the direction of Respondent.

The Respondent under 12 U.S.C. § 1821(d) (E) must further take into consideration the conditions of credit in the locality. This is an added responsibility that is not provided under 12 U.S.C. § 1821(d) (A) and (B).

Contrary to Respondent's claim (Resp. 4), Petitioner does not contend that all personal guarantors of debt should have a windfall, alone among the obligors of the institution. It is the contention of Plaintiff that in the case before this Court that the guaranty agreement by its own terms provides the limitations, by contract, which prevent Respondent from succeeding to the rights of the failed bank.

The terms of the guaranty:

> "Whenever used herein, the word . . . "Bank" or "Creditor" refers to *United Bank-Houston,* Houston, Texas, its *corporate successor* and where it assigns any of the indebtedness, then so far as the assigned part in thereof is concerned, its assigns, . . . "

clearly define that only the bank itself, its corporate successor (not statutory successors by federal statute) and its assigns can assert any rights under the guaranty.

This particular guaranty may be the only one that the Respondent has had to confront where the guarantor provided for such protection, but it is definitively clear that Respondent can not assert any rights under this guaranty, where the laws of the State of Texas so clearly protect the guarantor when he contracts to limit his liability.

In a very recent case, *Vastine v. Bank of Dallas,* 808 S.W.2d 463 (Tex. 1991), the Supreme Court of Texas held that Texas courts apply the rule of *strictissimi juris* in interpreting guaranty agreements to refrain from extending the guarantor's obligation by implication beyond the written terms of the agreement.

The Supreme Court of Texas has consistantly applied this rule in determining liability of guarantors under guaranty agreements.

2. Respondent is clearly wrong by avering that Petitioner has failed to establish a federal issue warranting further review (Resp. 4). Similar facts are involved in both this case and *In Re Worchester,* 811 F2d 1224 (9th Cir. 1987), as both cases relate to improper descriptions of property in a foreclosure sale. Petitioner (Pet. App. F and App. G, pp. 28-35) clearly establish that the description of the property in the notice of trustee's sale was not exactly the same property conveyed by the trustee at the foreclosure sale. The court in *In Re Worchester,* held:

> "Under California law 'gross inadequacy of price coupled with even slight unfairness or irregularity is a sufficient basis for setting the sale aside:. . . .

> Inquiry would have disclosed that the Notice of Trustee's Sale also misdescribed the property subject to foreclosure and thereby put Rosner and Little on notice that there was an irregularity in the sale that may have prejudiced Worchester by discouraging buyers interested only in residential properties."

The further fact that the record before the trial court had an affidavit signed by Petitioner (Pet. App. H, pp. 37-39) declaring that the property was worth $748,000 when the trustee sold the property for $170,000, is clearly sufficient evidence to meet the requirement under Texas law that a foreclosure sale can be set aside if the party challenging the sale can prove both that the property was sold for a grossly inadequate consideration and that there was a material irregularity in the sale procedure. *American Savings & Loan Assn. v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975).

Clearly, the Fifth Circuit case before this Court which holds there was no irregularity even though there was an improper property description in the Notice of Foreclosure Sale, conflicts with the law propounded in the Ninth Circuit which holds that an irregularity in a description along with grossly inadequate consideration merits setting aside a foreclosure sale.

Respondent in its Brief (Resp. 5) contends that none of the aspects of the sale cited by Petitioner had a material effect on the sale. It is evident from the fact that potential bidders upon reviewing the list of lots described in the Notice of Trustee's Sale, and identifying a lot that

has an expensive home built on it and included wrongfully in the list of lots to be sold, would certainly be chilled in its decision to bid for the remaining lots.

Respondent relies on the decision of the appellate court in *Diversified Developers Inc. v. Texas Mortgage REIT*, 592 S.W.2d 43, 44 (Tex. Civ. App. 1979) to support its position. However, the Texas court found that the question of the validity of a trustee's sale, when previously released acreage was wrongfully advertised for sale in the foreclosure notice, has not been addressed or determined by a Texas court. This point has not been addressed by the Supreme Court of Texas.

CONCLUSION

For all the reasons set forth herein, Petitioner prays that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit. Petition submits that it is appropriate for this Court to make a summary disposition on the merits pursuant to Sup. Ct. R. 16.1 and reverse and remand the case to the District Court for resolution of any remaining issues.

Respectfully submitted,

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